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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

No. 694

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, *Appellants*

vs.

DIXIE HIGHWAY EXPRESS, INC., ET AL, *Appellees*

No. 707

BRASWELL MOTOR FREIGHT LINES, INC., *Appellant*

vs.

DIXIE HIGHWAY EXPRESS, INC., ET AL, *Appellees*

On Appeal From the United States District Court for the Southern District of Mississippi

Appellant Braswell Motor Freight Lines, Inc., Reply to Appellees' Motion to Dismiss

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Appellees' motion to dismiss is without merit.

The short answer is that appellees contend in their motion to dismiss that the decision and judgment of the court below is merely a restatement of its first decision of July 19, 1965. Appellees say, therefore, that time for appeal began to run from date of the July 1965 judgment.

This Court said in *Federal Trade Commission vs. Colgate-Palmolive Co.*, 380 U.S. 374, 378, that where an agency "merely restate(s) its former position in a new order" and the reviewing court "reiterates its previous objection" that the agency is then barred from appealing the second decision.

But that is not what happened here. Here the Commission properly and reasonably construed the first decision of the court below as being directed to the lack of adequacy and sufficient findings of the Commission's original report and order. Although the first judgment (July 19, 1965) of the court below vaguely referred to its theory of existing competitors being "afforded an opportunity to rectify" the deficiencies of their service, nonetheless the court below did not spell out its meaning. "(I)t was not until the second opinion that the court below clearly articulated" *Colgate-Palmolive*, supra, at page 384, its "afforded opportunity" or "second chance" theory.

"Therefore, at the least, the court's second opinion resolved a genuine ambiguity in the first, and the time (for appeal) dates from the second judgment." Ibid. Cf. *Federal Power Commission vs. Idaho Power Co.*, 344 U.S. 17, 20; *Federal Trade Commission vs. Minneapolis-Honeywell Regulator Co.*, 344 U.S. 206, 211.

The foregoing is the complete answer to appellees' motion, but since we deign to answer we take a cue from the Chief Justice expressed in *Colgate-Palmolive*, supra, where he says that "The resolution of the issue . . . requires a detailed analysis of the var-

ious opinions, mandates and orders," etc., of the court below and of the Interstate Commerce Commission.

PRELIMINARY

This case grows out of a new certificate application filed by applicant under Section 207(a), Motor Carrier Act, *49 U.S.C. 307(a)*. The application was heard by a Joint Board, Section 205(a), *49 U.S.C. 305(a)*. The Joint Board denied the application. Appellant filed exceptions. *I.C.C. General Rules of Practice, Rules 1.96 and 1.97*, F.R. Vol. 31—Number 140. The Interstate Commerce Commission reversed the Joint Board and granted the application. Petitions for reconsideration were filed. *I.C.C. General Rules of Practice, Rule 1.101*. Ibid. Said petitions were denied.

Appellees then filed the suit to set aside the Interstate Commerce Commission final order in the United States District Court, Southern District of Mississippi. Motor Carrier Act, Section 205(g), *49 U.S.C. 305(g)*. The court below, a statutory court of three judges, set aside the Commission's order and "(R)emanded to the Interstate Commerce Commission *for its reexamination and study and further action thereon* not inconsistent with the opinion of the Court herein." (Emphasis supplied). 242 Fed Supp. 1016, J.S. at p. 230a. The Interstate Commerce Commission did exactly that. J.S. pp. 8a-217a, Appendix C.

Appellees then filed *motion to enforce* the prior judgment. The motion was granted. 268 Fed.Supp.

239. Opinion is shown in J.S. as Appendix A, pp. 1a-5a. The "final decree," J.S. Appendix B, pp. 6a-7a, clearly shows the basis therefor as follows:

> "(2) That the decision of the Commission, dated January 17, 1966, is erroneous *as a matter of law*, and such decision and consequent judgment in its Action Number MC-111383 (Sub Number 16) . . . and the certificate authorized and issued pursuant thereto to such carrier are cancelled and annulled as invalid and void."

Thus we reach the final chapter of all proceedings, both before the Interstate Commerce Commission and in the court below.

THE TRUE BASIS OF FIRST DECISION AND THE REMAND

The basis of the first decision of the court below, 242 Fed. Supp. 1016, was the Commission's failure to make "basic findings as to the inadequacy of the service presently being rendered," the Commission having "dealt with this record throughout its report in vague and nebulous terms" and "with the problem in its entirety in generalities without favoring us with any facts found in this record to support the conclusion which they reached;" that such "findings and conclusions were lacking in this case."

In such circumstances there was an inherent error of law, i.e., failure to comply with Section 8(b), *5 U.S.C. 1007(b)*, of the Administrative Procedure Act. *Riss & Co. vs. United States and Interstate Commerce Commission*, 341 U.S. 907. This required the court

below to vacate the first Commission order[1] and to remand for "reexamination and study and further action."

This is in reality all that the court below did by its first decision. That is all it could do because the authority of the court on review of an administrative order is very limited.[2] The limitations are expressed in Section 10(e) of the Administrative Procedure Act. *5 U.S.C. 1009(e).*

Looking at the Commission's first report and order in the light of its condemnation as found in the court's first decision, 242 Fed.Supp. 1016, it is pretty obvious that an appeal to your Honorable Supreme Court would have met with nothing except the fate of an affirmance, *per curiam.* Consequently we believe that appellants pursued the proper course, in view of the *remand* with instructions to reexamine and restudy and for further action not inconsistent with the court's opinion. *United Gas Improvement Company vs. Continental Oil Co.*, No. 644, and *Federal Power Commission vs. Marr*, No. 693, 381 U.S. 392, 405, 406.

The court's decree following its first opinion repeated the language "this proceeding should be remanded to the Interstate Commerce Commission for its reexamination and study and further action thereon," and enjoined the Commission "*from issuing a*

[1] *I.C.C. vs. J. T. Transport Co.*, 368 U.S. 81, 93; *United States vs. Carolina Carrier Corp.*, 315 U.S. 475, 489; *United States vs. Chicago, M., St. P. & P. R. Co.*, 294 U.S. 499.

[2] This principle is so firmly embedded that citations are deemed unnecessary.

certificate of public convenience and necessity to the applicant *based on (its prior) report and order.*"

If the injunction and remand meant anything other than just what it said, i.e., its prior *report and order*, the court could have easily, and probably would, have chosen the word "*record.*" Thus the Commission was clearly free to do just what it did do. It made a "re-examination and study" of the record and entered a very detailed report and order after consideration of every facet entering into a determination of the question of "convenience and necessity" within the prescribed criteria of the Motor Carrier Act, *49 U.S. C. 301, et seq.*, and of the National Transportation Policy. And it pointed its finger at the volume and page number of the *record* and the specific exhibit number. The rationale of the order was, and is, clearly apparent. There was also a most painstaking compliance with the requirements of Section 8(b) of the Administrative Procedure Act, *5 U.S.C. 1007(b).*

When the Commission's report and order, following the remand, 100 M.C.C. 482, went back to the court on motion for enforcement of the court's first decree, 242 Fed.Supp. 1016, there was no real question left for the court to determine except whether or not the Commission's report and order was "inconsistent" with the court's instructions.

The doctrine of *res judicata* and equitable or collateral estoppel does not apply to decisions of administrative agencies. *Fairmount Aluminum Co. vs. C.L.R.*, 222 Fed.2d 622, cert. den. 350 U.S. 838;

Niagara-Mohawk Power Co. vs. Federal Power Commission, 202 Fed.2d 100, affirmed 347 U.S. 239.

But appellees' motion in this Court takes on the appearance of a plea of *res judicata* for they say that the judgment "entered in July 1965 was clearly a final judgment in that it resolved the litigation." This is true only, however, to the extent of the matter adjudicated. In this respect we have shown very clearly, and the opinion, 242 Fed.Supp. 1016, clearly demonstrates, that the matter adjudicated was limited to a finding that the Commission's decision, 95 M.C.C. 457, was lacking in specific findings; that the Commission made "no basic findings;" that the Commission "dealt with this record throughout its report in vague and nebulous terms." The court referred to the Commission's said report and order in various similar expressions.

This is made perfectly clear by referring to a letter addressed to one of the attorneys for appellees here by the court dated July 16, 1965, attached hereto as *Appendix A*.

But that decision of the court did not dispose of the entire proceeding for it was "*remanded.*"

EFFECT OF THE REMAND

The remand, of course, left the application proceeding open for disposition by the Commission. For matters committed by the Congress to the exclusive determination by the agency must be left to the agency under the doctrine of primary jurisdiction.

The court did the only thing which it could do within the limits of its judicial review function.

The remand *did not "foreclose the administrative agency, after its error had been corrected, from enforcing the legislative policy committed to its charge." Federal Communications Commission vs. Pottsville Broadcasting Co.*, 309 U.S. 134, 145.

In the case at bar the Interstate Commerce Commission had by its report and order, 100 M.C.C. 482, following the remand, "corrected" the error which had been pointed out by the court, and proceeded in a detailed opinion which gave effect to "the legislative policy committed to its charge."

In *Pottsville Broadcasting Company's* case, supra, it is said:

> "On review the court may thus correct errors of law and on remand the Commission is bound to act upon the correction. *Federal Power Comm'n v. Pacific Co.*, 307 U.S. 156. But an administrative determination in which is embedded a legal question open to judicial review does not impliedly foreclose the administrative agency, after its error has been corrected, from enforcing the legislative policy committed to its charge. Cf. *Ford Motor Co. v. Labor Board*, 305 U.S. 364."

The Supreme Court further noted in *Securities and Exchange Commission vs. Chenery Corp.*, 332 U.S. 194, 200-201 (1947), in sustaining a decision of the SEC which, on remand, had reached the same decision for different reasons:

> "When the case was directed to be remanded

> to the Commission for such further proceedings as might be appropriate, it was with the thought that the Commission would give full effect to its duties in harmony with the views we had expressed . . . After the remand was made, therefore, the Commission was bound to deal with the problem afresh, performing the function delegated to it by Congress."

A comprehensive statement of the respective functions of court and agency is set out in *Ford Motor Company vs. National Labor Relations Board*, 305 U.S. 364, 374 (1939):

> "The 'remand' does not encroach upon administrative functions. It means simply that the case is returned to the administrative body in order that it may take further action in accordance with the applicable law. See Federal Radio Commn. v. Nelson Brothers Co., 289 U.S. 266, 278.
>
> "Such a remand does not dismiss or terminate the administrative proceeding. If findings are lacking which may properly be made upon the evidence already received, the court does not require the evidence to be reheard. (Citations omitted). If further evidence is necessary and available to supply the basis for findings on material points, that evidence may be taken (Citations omitted). Whatever findings or order may subsequently be made will be subject to challenge if not adequately supported or the Board has failed to act in accordance with the statutory requirements."[3]

[3] Cf. *Regal Knitware Co. vs. N.L.R.B.*, 324 U.S. 9; *Morand Bros. Beverage Co. vs. N.L.R.B.*, 204 Fed.2d 529, cert. den. 346 U.S. 909; *Florida vs. United States*, 292 U.S. 1.

The court below said that the Commission had the "right and duty *to review this record* and to make its own determination thereon," 242 Fed.Supp. at 1020. That is, we repeat, exactly what the Commission did. And in doing so it was exceedingly cautious to see to it that its report and order was consistent with the only reasonable construction of the court's opinion. It was the Commission's *right and duty*. Under the Congressional delegation of authority, which in many specific respects exceeds that of the normal judicial function, especially the "reviewing power," Congress delegated the *exclusive* power to the Commission to determine the question of public convenience and necessity under Section 207(a) of the Motor Carrier Act, *49 U.S.C. 307(a)*.

In *Interstate Commerce Commission vs. Parker*, 306 U.S. 60 at page 65, it is said:

> "The purpose of Congress was to leave to the Commission authoritatively to decide whether additional motor service would serve public convenience and necessity. Cf. Powell v. United States, 300 US 276, 287, 81 L ed 643, 651, 57 S Ct 470. This, of course, gives administrative discretion to the Commission, cf. McLean Trucking Co. v. United States, 321 US 67, 87, 88, 88 L ed 544, 556, 557, 64 S Ct 370, to draw its conclusion from the infinite variety of circumstances which may occur in specific instances."

The foregoing analysis and consideration of authorities now brings us to a further consideration of whether appellees' motion to dismiss has any validity whatever.

As in the beginning of this reply to the motion, we assert that it is without merit.

We have pointed out the true basis for the court's first decision, i.e., lack of adequate, specific and intelligible findings—the "vague and nebulous" dealing with the record, etc.

TIME FOR APPEAL RUNS FROM DATE OF COURT'S SECOND DECREE

Date of judgment vacating the Commission's first report and order is July 19, 1965. Date of judgment of court below to enforce its first decree is May 15, 1967. The July 19, 1965, judgment remanded to the Commission for reexamination and study and further action not inconsistent with the court's opinion. Even the most casual examination of the Commission's resulting action, 100 M.C.C. 482, clearly and plainly shows that the Commission most scrupulously, and with exceeding care, observed the court's instructions.

The Commission clearly did not repeat the errors found by the court to inhere in the Commission's first report and order.

The court below not only recognizes this but admits it, for the court, 268 Fed.Supp. 239, says:

> "The Commission has made a detailed report with findings and conclusions upon which to reaffirm the prior determination as to the public convenience and necessity for the service requested with unimportant exceptions."

That should have been the end of it.

But from there the court went on, thus clearly showing the court's admission:

> "It is the considered judgment of this Court that such action of the Commission *rectifies* only part of the infirmity pointed out by the Court . . ." etc. "In criticising the order of the Commission . . ., this Court pointed out: There is no evidence in this record that existing carriers were afforded an opportunity to rectify any such deficiencies in their service." etc.

It was this holding which brought about the decree of enforcement of the court's first judgment.

It was this holding of the court below which projected the court into the realm of the legislative function and beyond its jurisdiction as a reviewing court. That judicial function is a very limited one. Authorities supra

In its first opinion the court expressed a belief that existing carriers should have this privilege upon a supposed requirement for "consistency of administrative rulings"—a second chance.

The court either did not understand, or refused to recognize, that the Commission in the use of the language, "We have repeatedly stated that existing carriers normally should be accorded an opportunity to transport all of the traffic they can handle *in an adequate and efficient manner* without the added competition of a new operation," was there considering one of the many facets which the Commission is required to consider in reaching a decision on the overall and ultimate issue of whether or not the public

convenience and necessity requires additional service —the criteria or standard prescribed by the Congress in the statute.

So in truth, fact and law the Commission did consider that criticism and at very great length. See 100 M.C.C. pp. 499-506, and Appendicies B, p. 510; D, pp. 514-516; E, PP. 517-518; and especially Appendix K, pp. 592-602, where the Commission considered each motor carrier separately and individually.

A consideration of the holding of the court below, and especially the criticism used by the court as a pretext for entering the enforcement decree, i.e., failure to *afford* existing carriers "an opportunity to rectify . . . deficiencies in their service," in relation to the Commission's last report and order makes the court below look pretty bad. Because in truth and fact existing carriers had that opportunity. Look at the facts.

Appellant Braswell Motor Freight Lines, Inc., filed its application on April 28, 1960; hearing began on November 28, 1960; applicant concluded its presentation on February 28, 1961; appellees here (the protestants) began presentation of their evidence on May 1, 1961, and concluded on June 1, 1961.

This timetable alone condemns the court's criticism, here under consideration, as utterly and completely unfounded. The appellees here, the protestants before the Commission, *actually had a full year's* (April 28, 1960, to May, 1961) "opportunity to rectify the . . . deficiencies in their service." They were faced with

"the added competition of a new operation" immediately upon the filing of the application. (Notice of filing of applications is published in the Federal Register). These appellees *had five months* after the hearing started before they began presentation of their opposition evidence.

One year is an awfully long time as a trial or test period—"affording opportunity"—to remedy the deficiencies of their service. Five months is a generous amount of time.

And it is obvious that the appellees tried to "rectify the deficiencies" of their services. See the Commission's treatment in Appendix K of its report and order —which shows the appellees' traffic studies and exhibits all covered periods of time *after* the hearings began. Such efforts are common. The Commission has taken notice of it before. *Strickland Transportation Company*, 77 M.C.C. 655. We quote:

> "There is nothing in this record to indicate that the improved service demanded by the public and offered by the respective applicants is in any manner inconsistent with sound operating policies or otherwise unreasonable in any respect. Both Herrin and TSC hold themselves out to provide next-morning or next-day service between the considered points and both have demonstrated their ability to perform such service when they choose to do so. They have further demonstrated, however, that they cannot be depended upon to provide the type of service of which they are capable, except when faced with an imminent threat of additional competition.
>
> "In our decision in "*Southern Exp., Inc., Com-*

mon Carrier Application, cited above, decided June 10, 1953, which involved issues substantially the same as those here presented, we stated:

"after the instant applications were filed, both Herrin and T.S.C. improved their services between Houston and New Orleans. Some of the shippers fear, however, that without added competition from one or more of the applicants the improved service will be discontinued. In our opinion, the record affords no reasonable basis for such a conclusion.

"Here, as in the prior proceeding, Herrin and TSC are shown to have materially improved their Houston-New Orleans services after the filing of the instant applications. Even with such improvement, however, Herrin provided next-day delivery on only 60 percent of the shipments transported between Houston and New Orleans in August 1955, and TSC provided next-day service on only 33 percent of the shipments handled between the same points in June and July of 1955. The 70-percent figure attained by Herrin in January of 1956 is more impressive, *but we are not convinced that it may be depended upon to continue service on that plane, particularly in view of the deterioration in service noted after the denial of the 1947 applications and the elimination of the competitive stimulus resulting therefrom.* TSC's record of only a little over 50 percent next-day service compiled in January and February 1956 is not impressive under any circumstances. We conclude that the existing service of Herrin and TSC between Houston and New Orleans is not reasonably adequate to meet the present and future requirements of the public for expeditious motor service; and that the granting of authority

for the institution of some additional service is justified." (emphasis supplied).

The foregoing quote clearly demonstrates that in cases such as this the final granting of an application, if based upon substantial evidence, which is admitted here, had best be left to the expertise of the agency ordained by Congress to make them.

But more importantly, a study of the Commission's last report and order clearly, completely and unalterably demonstrates the inexcusable error of the court in saying, after otherwise admitting the sufficiency of said report and order, that: "(S)uch action of the Commission rectifies *only part* of the infirmity pointed out by the court . . ."

The Commission's report and order, 100 M.C.C. 482, *literally* covered every inch of the court's criticisms and instructions.

However, even if said report and order had failed in the respect and in the sense that the court apparently intended, the "alleged opportunity," it would have been immaterial. For *if intended as an iron-clad instruction it was beyond the power* of the court because it impinged upon the legislative power of Congress, and also the limited legislative power which Congress delegated to the Commission to fill in the interstices of the Motor Carrier Act within the broad outlines of that Act.

Criticism of the court below was limited to the "*present*" but this disregards the language of the statute, *49 U.S.C. 307(a)*, which authorizes the Com-

mission to issue a certificate of convenience and necessity if the Commission finds "that the proposed service to the extent to be authorized by the certificate, is or will be required *by* the *present or future* public convenience and necessity." Section 307(a).

The court below, by its second decree, 268 Fed.Supp. 239, committed fundamental error.

This is clearly illustrated in *United States, et al vs. Detroit & Cleveland Navigation Co.*, 326 U.S. 236. We quote from page 241:

> "The Commission is the guardian of the public interest in determining whether certificates of convenience and necessity shall be granted. For the performance of that function the Commission has been entrusted with a wide range of discretionary authority. Interstate Commerce Commission v. Parker, 326 US 60, 89 L ed 2051, 65 S Ct 1490. Its function is not only to appraise the facts and to draw inferences from them but also to bring to bear upon the problem an expert judgment and to determine from its analysis of the total situation on which side of the controversy the public interest lies. Its doubt that the public interest will be adequately served if resumption of service is left to existing carriers is entitled to the same respect as its expert judgment on other complicated transportation problems. See Chesapeake & O.R. Co. v. United States, 283 US 35, 42, 75 L ed 824; 829, 51 S Ct 337; Alton R. Co. v. United States, 315 US 15, 23, 86 L ed 586, 595, 62 S Ct 432. Forecasts as to the future are necessary to the decision. But neither uncertainties as to the future nor the inability or failure of existing carriers to show the sufficiency of their plans

> to meet future traffic demands need paralyze the Commission into inaction. It may be that the public interest requires that future shipping needs be assured rather than left uncertain. The Commission has the discretion so to decide. It went no further here."[4]

We have now clearly shown that the Commission fully, completely and literally complied with the mandate of the court below, as the instructions of said court are shown in its opinion and decree, 242 Fed. Supp. 1016, specifically including the criticism "that existing carriers were (not) afforded an opportunity to rectify any such deficiencies in their services."

Even so the latter criticism was not within the province of the court, that court having overlooked or having completely ignored the Congressional mandate to the Commission as spelled out in Section 307(a) of the Act, *49 U.S.C. 307(a)*. The mandate of the court below ran counter-clock-wise to that of the statute and of Congress.

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[4] Cf. *Interstate Commerce Commission vs. Parker*, 326 U.S. 60; *American Trucking Association vs. United States*, 326 U.S. 77; *Davidson Transfer & Storage Co. vs. United States*, 42 Fed.Supp. 215, affirmed 317 U.S. 587.

THE APPEALABEE QUESTION

We apologize for the length of the discussion leading up to the contention of appellees set out in their motion. May we please be pardoned for what we felt essential in this respect.

Appellees say there is no appealable question; that the only question before the court below "was whether or not the Commission had complied with the original mandate."

Well, we have shown, and the Commission's report and order, 100 M.C.C. 482, shows on its face, that the Commission made literal compliance. Then appellees say that the appeal to this Honorable Court is "nothing more than an attempt to assail that original judgment." Not so, not at all.

On this mere fiat of the appellees, they say that time for appeal began to run from the date of entry of the first judgment on July 19, 1965. And then they say that the "Commission did no more by its second decision than to restate the position taken in its first decision." But let us again point out that the court below *admits* the adequacy of the fact findings of the Commission, the rationale thereof and substantiality of the evidence.

Then appellees, continuing in the same sentence of the next above quote, say that "and the lower court did no more than reiterate its former objections."

Appellant humbly and most respectfully submits that the contention closely approaches the frivolous. It might be that we should not deign to have answered it.

The Commission fully complying with the court's mandate and leaving nothing within the jurisdiction of the court except to affirm the action of the Commission, the court below plunged off into Congressional functions and announced a new requirement of substantive law in addition, but contrary, to the provisions of Section 307(a) which is in conflict with the very language of and the intent and purpose of Congress in its entire plan of regulation of motor carriers —in fact, of all regulated carriers.

All of this is a far, very far, cry from the mere fiat of appellees, that the Commission merely repeated its errors and the court merely repeated its former objections.

Moreover, the court below also prescribed a procedural rule of conduct. That rule is, says the court, that the Commission must afford existing competing carriers "an opportunity to rectify any such deficiencies in their service."

In the light of the Congressional plan of regulation and of Section 307(a) in particular, when remembering Congress' use of the words "present *or future*," the lower court's prescribed rule taxes the imagination. What does it mean? When should existing competitive carriers be "afforded" such "opportunity"? If before the hearing, then in this case they had from April 1960 to December 1960, yea, in fact to May 1961. This we have already pointed out.

Or is it after the hearing of the applicant's evidence? If after, then for how long a time does this

unorthodox procedure continue, one month, or two, or a year?

In this case, at least, that "afforded" time was, according to the court below, *after* the hearing. But this simply will not do.

Such a court-prescribed procedural rule runs contrary to the authority which Congress delegated to the Commission as contained in Section 304(a), *49 U.S.C. 304(a)*, and Section 304(a)(6) in particular.

Again we ask, what is the court below going to do with the words "or future" of Section 307(a); and what is the court below going to do with the provisions of Section 307(b)?

The court below went far beyond its review function and announced *a rule of property* which is not within the purview of the Motor Carrier Act, the purpose of Congress, and never before acknowledged or asserted by any court. It is specifically denied in Section 307(b)

The right of the Commission to authorize new operations, even if service of existing carriers is *presently* adequate, has been confirmed by the courts based upon *future* transportation needs, as we have already shown. Under the language of the statute (Section 307(a)), "Forecasts as to the future are necessary to the decision. But neither uncertainties as to the future nor the inability or failure of existing carriers to show the sufficiency of their plans to meet future traffic demands *need paralyze the Commission into inaction.*" See *United States vs. Detroit & Cleveland Navigation Co.*, 326 U.S. at page 241, and footnote 4, supra.

The fact is that the court below undertook to deal with matters of which it had never dreamed; that its opinion and decree, 268 Fed.Supp. 239, opened a Pandora's box of uncertainties which, in substantial part, destroys the administrative process generally and the Congressional plan of regulating of carriers in particular. As to the Interstate Commerce Commission, it creates administrative chaos.

Consider for a moment, if the Court please, the effects of the trial court's ruling, if accepted, upon the work of the vast and varied administrative as well as judicial tribunals of the federal system and the equally numerous and diversified interests affected by their functioning; or, indeed upon the many and different types of administrative and judicial procedures which Congress has provided for dealing adjudicatively with such interests.

Appellees rely solely upon *Federal Trade Commission vs. Colgate-Palmolive Co.*, 380 U.S. 374, and what this Court said at page 378. The trouble is that appellees disregard what this Court said immediately following the language which appellees quote at page 8 of their motion. For this Court immediately said:

> "However, it has also been held that when a reviewing court finds a legal error in an administrative order, the agency is not foreclosed upon the remand of the case from enforcing the legislative policy of the act it administers, provided the new order does not conflict with the reviewing court's mandate."

It clearly appears here that the Commission literally

complied with the mandate of the court below, sans the court's fundamental error complained of by all appellants. This we have clearly demonstrated. But in any event, upon the remand this Court said that "if the reviewing court finds a legal error . . . the agency is not foreclosed from enforcing the *legislative policy*." Ibid.[5]

As in *Colgate-Palmolive*'s case, the only clear directive to the Interstate Commerce Commission was for "reexamination and study and further action not inconsistent" etc. Reiterating, this the Commission did and in so doing gave effect to the legislative policy of Section 307(a) of the Act, *49 U.S.C. 307(a)*. This the Commission was compelled as a matter of law to do.

In any event, the only error of the Commission, clearly pointed out by the court below, was lack of adequate findings to satisfy the requirements of courts even prior to the Administrative Procedure Act, *5 U.S.C. 1001, et seq.*, and now required by Congress in Section 7(b), ibid, was fully complied with.

Again, as in *Colgate-Palmolive*'s case, supra, we say as did this Court, "We find it inconceivable" that any of the appellants here "could have successfully" maintained an appeal from the decree of the court below. An appeal at that point would, in the writer's opinion, have been folly. But the situation has now completely changed.

That part of the first opinion of the court below

[5] Citing: *Securities & Exchange Commission vs. Chenery Corp.*, 332 U.S. 194, 200; *Federal Communications Commission vs. Pottsville Broadcasting Co.*, 309 U.S. 134, 145.

about affording competing carriers an opportunity to rectify the deficiencies of their service was indefinite, vague and nebulous. It was believed that it meant no more and, in view of the statute, Section 307(a), that it could mean no more than to give consideration to the adequacy and sufficiency of competitive carriers as one factor or element among all other factors to be considered in determining the ultimate issue of *present and future* public convenience and necessity.

But by the second opinion of the court below, 268 Fed.Supp. 239, it turns out to be something very different, very, very different. The second opinion resolved the vagaries and ambiguities of the first. The second opinion did more. Without warrant it entered the legislative field in the prescription of both substantive and adjective law.

The time for appeal began to run from the date of the entry of the second judgment, May 15, 1967. *Colgate-Palmolive's* case, 380 U.S. 374, 384, citing *Federal Trade Commission vs. Minneapolis-Honeywell Regulator Co.*, 344 U.S. 206, 211.[6]

> "(B)ut this Court is never foreclosed from determining the issue for itself." *Colgate-Palmolive's* case, supra, page 379.

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[6] Cf. *Labor Board vs. Donnelly Garment Co.*, 330 U.S. 219, 227, and other cases cited in footnote 5.

The motion must be dismissed. This appellant so prays.

Respectfully submitted,

PHILLIPS & PETERS
1819 Guaranty National Bank Bldg.
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Attorneys for Appellant
Braswell Motor Freight Lines, Inc.

PROOF OF SERVICE

I, T. S. Christopher, one of the attorneys for Braswell Motor Freight Lines, Inc., an Appellant herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 28th day of November, 1967, I served copies of the foregoing jurisdictional Statement on the several parties to this action as follows:

1. On the United States, by mailing copies thereof, in duly addressed envelopes, with air mail postage prepaid, to Honorable Edwin N. Griswold, Solicitor General of the United States, Department of Justice, Washington, D. C.; to Honorable Donald F. Turner, Assistant Attorney General, Department of Justice, Washington, D. C.; and to Honorable Howard E. Shapiro and Honorable William R. Weissman, Attorneys, department of Justice, Washington, D. C. 20530.

2. On the Interstate Commerce Commission, by mailing copies thereof, in duly addressed envelopes, with air mail postage prepaid, to Honorable Robert W. Ginnane, General Counsel, Interstate Commerce Commission, Washington, D. C.; and to Honorable Betty Jo Christian, Attorney, Interstate Commerce Commission, Washington, D. C.

3. On the Appellees herein, by mailing copies thereof, in duly addressed envelopes, with air mail postage prepaid, to R. J. Reynolds III, Esq., Reynolds and Reynolds, 403 Healey Building, Atlanta, Georgia 30303; to Robert E. Joyner, Esq., Wrape & Hernley, 2111 Sterick Building, Memphis, Tennessee 38103; to

Bates Block, Esq., Hansell, Post, Brandon & Dorsey, 600 First National Bank Building, Atlanta, Georgia 30303; to Wentworth Griffin, Esq., Reeder, Griffin & Dysart, 1221 Baltimore Avenue, Kansas City, Missouri 64015; to W. D. Benson, Jr., Esq., 900 Citizens Tower, Lubbock, Texas 77001; to Ed White, Esq., 280 Union Station Building, Chicago, Illinois 60606; to William O. Turney, Esq., Turney, Major, Markham & Sherfy, 2001 Massachusetts Avenue, N.W., Washington, D. C. 20036; to John S. Fessenden, Esq., Rice, Carpenter & Carraway, 618 Perpetual Building, Washington, D. C. 20004; and to Clarence W. Vandegrift, Esq., Room 305, 1012 14th Street, N.W., Washington, D. C. 20004.

T. S. Christopher
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Fort Worth, Texas 76102

APPENDIX A

United States District Court
Southern District of Mississippi
Jackson, Mississippi

July 16, 1965

William Harold Cox
District Judge

Mr. Phineas Stevens
Attorney
Petroleum Building
Jackson, Mississippi

Dear Mr. Stevens:

Re: Dixie Highway Express, Inc., et al
v.
United States, et al
Civil Action No. 1273(E)

The final judgment and decree submitted to the Court has been signed today by me as the last signatory thereto.

The proposed Findings of Fact and Conclusions of Law is returned to you without any signatures affixed thereto. Such Findings and Conclusions are not necessary but it is the view of the Court that it would not be proper in this case to undertake any such detailed Findings and Conclusions since the Court did not examine the record to that extent. We only examined it to the extent necessary to support the criticism made of it and feel that our criticism was sufficiently

clear to obviate the necessity of any further Findings and Conclusions.

Yours very truly,

s/ Haroll Cox

WHC:afc
Enclosure

cc: Rubel Phillips
M. Ward Bailey
Honorable John Minor Wisdom
Honorable Griffin B. Bell